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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1049

BERTRAM KRONEN,
Petitioner,

VS.

PACIFIC COAST SOCIETY OF ORTHODONTISTS, AMERICAN ASSOCIATION OF ORTHODONTISTS, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal of the State of California, First Appellate District

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OPINIONS BELOW

The petition correctly cites or appendices the Findings, Conclusion and Judgment of the trial court and the opinion of the District Court of Appeal. The fact that no written opinions were filed on denial of petition for rehearing or hearing is also correctly stated, as are the dates of denial.

JURISDICTION

Petitioner incorrectly asserts jurisdiction of this Court under 28 U.S.C. Section 1257 (3). Respondents assert, on the contrary, that the Court is without jurisdiction to grant the writ on the grounds that no Federal question was properly raised below, that Respondents are not engaged in State action as claimed, that Petitioner was not denied due process or equal protection, and that decision of the District Court of Appeal is more than adequately supported in the record.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the decision of the District Court of Appeal on writ of certiorari?

Only if this question is answered in the affirmative, then the following questions are presented:

2. Is there any evidence in the record to show that the activities of the respondent societies constitute state action? If so, did Respondent societies deny Petitioner due process and equal protection of the law?

3. Did the California courts deny due process and equal protection of the law to Petitioner, and does the record contain sufficient evidence to sustain the action of the California courts?

STATEMENT OF CASE

Below, Petitioner sought to judicially enforce Respondent associations to accept him into membership. The trial court found in favor of Respondents. (Appendix A to Petition.) The District Court of Appeal affirmed (Appendix B to Petition) and Petitions for Rehearing and for Hearing in the Supreme Court of California were denied. (Hereafter, the opinion of the District Court of Appeal will be referred to as Appendix B.)

Petitioner is a licensed Doctor of Dental Surgery in the State of California, limiting his practice to orthodontics since 1957. Orthodontics is a special branch of dentistry concerning itself with the straightening of teeth. (RT 94:7-11.) It is practiced in the office exclusively (as opposed to hospitals) and the duration of treatment varies with the individual case and the different philosophies of orthodontists. (RT 95:4-6.) Respondents, American Association of Orthodontists (hereafter called A.A.O.) and Pacific Coast Society of Orthodontists (hereafter called P.C.S.O.) are professional associations whose membership is limited to dentists practicing exclusively in orthdontics and who *may* be elected to membership after meeting minimum educational and professional requirements. (Pl. Exs. 1 and 2; Appendix B, footnotes 2, 3 and 4.) Respondent P.C.S.O. is a constituent society of the A.A.O., the national organization, and embraces generally the western portion of the United States. The P.C.S.O. is divided into three component societies, and it is the central component of P.C.S.O.

with which we are here concerned. (Hereafter, emphasis is ours unless otherwise noted.)

Pertinent provisions of the Articles, By-Laws, membership requirements and membership application forms are contained in Footnotes 2, 3, 4, and 8, respectively, of the Opinion of the District Court of Appeal. (Appendix B.) Other footnoted regulations, particularly Footnote 10 relating to announcement of limitation of practice will be discussed hereafter.

Petitioner, who established practice in Santa Rosa, was admitted to associate membership in P.C.S.O. in 1957; his sponsors were Doctors Ballard and Cox from Santa Rosa. (RT 25:13-26:15; Appendix B, pp. 6 and 8.) He applied for active membership on February 28, 1960. (RT 68:12-69:24.) This application was also signed by Doctors Ballard and Cox as endorsers. Following receipt of the application, numerous adverse comments and complaints about his ability and qualifications were received by the membership committee of the P.C.S.O. and the Central Component. (RT 317:5-21; 303:23-304:16; 320:12-18; 372:25-378:23; Appendix B, p. 9.)

In discharging its obligation to the Society and in order to determine whether applicant possessed "the necessary knowledge, both mechanical and biological," the membership committee decided that an examination similar to that given to preceptees should be given to Petitioner. (RT 303:23-306:25; 378:4-23; Appendix B, pp. 9 and 10.) Such investigation was required of the committee (Plaintiff's Exhibit 2—

Members shall Investigate), particularly in view of the adverse comments.

Since Petitioner practiced in a relatively small geographical area, it was decided that the examination should be conducted by the membership committee of the Pacific Coast Society of Orthodontists, not merely the committee of the Central Component. (RT 378:4-23; 303:23-306:25; Appendix B, p. 10.) Petitioner consented and agreed to this examination and actually took it. The examiners were disinterested, qualified and eminent orthodontists from diversified areas. They were: Doctors Emory Fraser of Seattle, Malcolm Chipman of Spokane, George Hahn of Berkeley, William Smith of Richmond, Harvey Spears of Santa Ana, and H. V. Muchnic of Beverly Hills. (RT 309:2-25; Appendix B, p. 10, Footnote 7.) The examination was fairly given without any restrictions. (RT 310:1-20; 318:3-10; Appendix B, p. 10.)

The examination was given in three parts. Petitioner passed the written portion but failed the oral and technical portions. (RT 379:4-14; Appendix B, p. 10.) Since failure of the examination and rejection of membership would require publication in the bulletin and attendant general knowledge in the profession, Petitioner withdrew his application on March 21, 1961 at the suggestion of the membership committee (RT 43:19-44:6; 380:8-381:6; 288:8-25; Appendix B, p. 11), thus avoiding this embarrassment. It was suggested that he return to Santa Rosa and improve his competency as an orthodontist. (Appendix B, p. 11.) The committee offered its good offices

and those of its members to help Petitioner in achieving the "mechanical and biological" knowledge necessary to produce good orthodontic care. Petitioner availed himself of this offer on only one occasion, a single visit to the office of Dr. Hahn. (RT 381:4-382:5.)

Dr. Hahn examined Petitioner criticially and gave advice and suggestions on how to treat people in this profession dealing mainly with children. Dr. Hahn stated that Petitioner's knowledge of orthodontics was satisfactory but his application of that knowledge was not. (Appendix B, p. 11.) Members of the Committee advised Petitioner to take specifically named refresher courses (Appendix B, p. 11) which he did not do. (Appendix B, p. 15.) Even though reminded that it was essential to have as endorsers two active members practicing in his community (Appendix B, p. 12; Footnote 8, p. 12), petitioner instead went so far as to refuse to allow colleagues from his area in Santa Rosa to visit his office and review his work. (RT 57:3-19; 165:22-166:13; 223:6-23.)

Petitioner filed another application for active membership on February 1, 1962. (RT 68:12-69:24.) He asked the Doctors Ballard and Cox to endorse this application. They refused when he would not permit them to come to his office and review his work. (RT 165:22-166:13; Appendix B, p. 12.) The sponsors he did secure were not from the Santa Rosa area where he practiced. Obtaining sponsors from the area where an applicant practices had been a long-standing policy of Respondents (RT 287:1-8, Note to Pl. Exs. 8 and 9;

Appendix B, Footnote 8, p. 12; also 13), and was known to Petitioner. (Appendix B, p. 12.) Failing to obtain sponsors from his own area Petitioner prevailed upon Dr. Straub of San Mateo and Dr. Hartman from San Francisco to sign his application. (RT 223:13-225:1; 242:19-243:11.) These two men subsequently withdrew their sponsorship voluntarily. Both felt they acted hastily in signing the application, did not have sufficient knowledge of Petitioner's ability, did not know he had failed to take the suggested refresher courses, and that Drs. Ballard and Cox had refused to sign, and had not had the opportunity of visiting his office to examine his work. (RT 200:9-201:12; 203:9-16; 212:9-215:4; 225:9-18; 249:5-250:5; Appendix B, pp. 13-15.) Because the Petitioner was then without sponsors, his application was not considered at the membership meeting of the Central Component on March 20, 1962, and it thus remained open "so he could go to the courses and get credit." (Appendix B, p. 17.)

The California District Court of Appeal properly concluded "that plaintiff received no arbitrary or improper treatment at the hands of defendants' representatives; that he was given a fair examination by a representative group of experienced orthodontists; and that, upon his failure to pass it, he was given an opportunity to avoid the publicized stigma of failure, to withdraw his application and remain an associate member and finally, to prepare himself for another test" * * * "that the activities of Drs. Hahn and Smith in connection with the incident" (of with-

drawal of sponsorship) "emanated not from a conspiracy, as claimed by plaintiff, but from a sincere sense of responsibility to their profession, the public and even to plaintiff himself." * * * "that plaintiff was given the privilege of a second examination and an opportunity to improve himself in the meantime and the further evidence that the Santa Rosa doctors offered to sign his application if plaintiff would permit them to come to his office and inspect his work;" * * * and "that plaintiff, having decided to reject the opportunities and suggestions made available to him after his first failure, insisted upon proceeding with his second application with the attitude that his qualifications were sufficient and that he should be admitted forthwith without the necessity of submitting his work to the inspection of his colleagues. (Appendix B, p. 26:7.)

At the time of trial herein (some three years ago), Section 18 "Announcement of Limitation of Practice" of the Principles of Ethics of the American Dental Association (hereafter referred to as Section 18), reads as appears in plaintiff's exhibits 12 and 13. It was solely on this basis that the District Court of Appeal found that membership in Respondent Associations constituted an economic necessity. While we disagree with that interpretation, the question is now moot in view of the subsequent changes in Section 18 (see our Appendix A hereto).

Section 18 (eliminating the portions not pertinent here), presently in force and effect, provides that a dentist who "limits his practice to one of the special

areas approved" by the A.D.A. (orthodontics is one of the areas approved) may announce his limitation of practice "provided at the time of the announcement, he has met the existing educational requirements and standards * * *" set by the A.D.A. for those wishing to so announce such limitation.

Those standards set by the A.D.A. are:

> (1) Area of practice must be approved (orthodontists; (2) The dentist's practice must be limited (Petitioner's is so limited); and (3) "The dentist must have completed two or more academic years of advanced education as specified by the certifying boards, essentially all of which must be in or directly related to the selected area, * * *".

The third standard quoted above is the one that is crucial in this case. It is undisputed that Petitioner has completed two or more academic years of the required advanced education. Having satisfied all requirements for ethical announcement of his limitation of practice, the holding of "economic necessity for membership" must fall and this issue is now moot.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF APPEAL.

Petitioner asserts that the jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). (Petition for a Writ of Cert. p. 2.) It is the position of Respondents that this Court does not have jurisdiction to review the judgment of the District Court of Appeal of the State of California by writ of certiorari because the record does not show that a title, right, privilege, or immunity was "specially set up or claimed" in the state court as belonging to Petitioner under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States as required by 28 U.S.C. Section 1257 (3). (*F. G. Oxley Stave Co. v. Butler County,* 166 U.S. 648, 653, 41 L. Ed. 1149, 1151, decided under U.S. Rev. Stat. § 709 from which 28 U.S.C. 1257 is derived; *Mutual Life Ins. Co. of New York v. McGrew,* 188 U.S. 291, 310, 47 L. Ed. 480, 485; *Chicago I. & L.R. Co. v. Hackett,* 228 U.S. 559, 57 L. Ed. 966.)

Petitioner raised the question of the alleged violation of his constitutional rights for the first time in his Petition for Rehearing before the District Court of Appeal of the State of California. (Pet. for Rehearing, p. 2.) Where a federal question is raised for the first time in a petition for rehearing in a state Appellate Court and there had been ample opportunity to present the question earlier as being one arising under the Fourteenth Amendment the federal

claim cannot serve as the basis for review by the United States Supreme Court. (*American Surety Co. v. Baldwin,* 287 U.S. 156, 163, 77 L. Ed. 231, 236.)

Nowhere in Petitioner's pleadings, pre-trial statement, argument before the trial court, or in his opening or reply brief on appeal did he "specially set up or claim" any title, right, privilege or immunity under the Constitution of the United States. Surely Petitioner had ample opportunity to do so prior to the filing of his Petition for Rehearing before the California District Court of Appeal.

The proper time and the proper way for setting up this right is in the trial court. (*Mutual Life Ins. Co. of New York v. McGrew,* supra.) The record of the trial court filed herein clearly discloses that there was no reference to the Constitution of the United States or any claimed violation of due process or equal protection by Respondents.

Where the assertion of a Federal right was not urged in the trial court, or called to the attention of, or decided by, the Appellate Court there is no Federal question before this Court. (*Cincinnati, N.O. & T. P. R. Co. v. Slade,* 216 U.S. 78, 54 L. Ed. 390.)

As was said by Justice Harlan in *F. G. Oxley Stave Co. v. Butler County,* supra, at page 655:

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; *and unless he does so declare 'specially,'*

that is, unmistakably, this court is without authority to reexamine the final judgment of the state court." (Emphasis ours.)

The statutory requirement under 28 U.S.C. 1257(3) is not met if the declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. (*F. G. Oxley Stave Co. v. Butler County,* supra.) Petitioner only made a general assertion that ". . . plaintiff's constitutional rights were violated . . ." (Pet. for Rehearing, p. 2) without making it unmistakably clear what portion of what Constitution was allegedly violated. The asserted constitutional right, whether it was federal or state and what it was, was left to inference, conjecture and surmise.

Furthermore, it does not affirmatively appear in the record that the federal question was presented to the highest state court; that its decision of the federal question was necessary to the determination of the cause; and that it was actually decided or that the judgment as rendered could not have been given without deciding it. Where the above requirements have not been met this Court is lacking in jurisdiction. (*Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54, 79 L. Ed. 191, 193; *Honeyman v. Hanan,* 300 U.S. 14, 18, 81 L. Ed. 476, 479.)

In addition the Supreme Court of the United States is without power to decide whether or not Constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the

requirements of state law. (*Edelman v. California,* 344 U.S. 357, 358, 97 L. Ed. 387, 391.) A point made for the first time in a petition for rehearing (as was done here) will not be considered by the California courts. (*Flores v. Stone,* 21 C.A. 105, 111, 131 P. 348; *Mann v. Brison,* 120 C.A. 450, 452, 7 P. 2d 1110; *People ex rel. Dept. of Public Works v. Mascotti,* 206 C.A. 2d 772, 779, 780, 23 Cal. Rptr. 846; *People v. Blevins,* 222 C.A.2d 801, 805, 35 Cal. Rptr. 348 (headnote 6).

This Court is also without jurisdiction to pass on a question that is moot. (*Kimball v. Kimball,* 174 U.S. 158, 43 L. Ed. 932.) The question of economic necessity herein has become moot in view of the new Section 18 of the Principles of Ethics of the American Dental Association (our Appendix A) which no longer makes it unethical for Petitioner to announce his limitation of practice to orthodontics.

Having failed in his burden to show that the U. S. Supreme Court has jurisdiction to review the judgment of the state court (*Gorman v. Washington University,* 316 U.S. 98, 101, 86 L. Ed. 1300, 1302) the petition should be denied.

II

(A) RESPONDENT ASSOCIATIONS ARE NOT INVOLVED IN STATE ACTION.

With respect to voluntary membership associations, the general rule has consistently been stated as follows:

> "Membership in a voluntary unincorporated association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The grant or refusal of membership is within the complete control of the association, and the courts cannot compel the admission of an individual into such an association. If his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion." (6 Am. Jur. 2d 443-444.)

Exceptions to this well-established rule have been made where a private voluntary organization, through its own actions or the actions of the State, has become involved in what has been variously described as "State action", "Economic necessity" or "Monopoly". These conditions have been found to exist only where the state has delegated, directly or indirectly, to a private organization some governmental function normally reserved to the State, or where a private organization, by activities on its own part, acquires a quasi-public status, such as the right to control one's ability to earn a living in his chosen field. None of these conditions, we submit, exists here.

Petitioner's conclusionary arguments in his petition are wholly unsupported and completely without merit. The case upon which he principally relies, *Kurk v. Medical Society of the County of Queens, Inc.*, 46 Misc. 2d 790, 260 N.Y.S. 2d 520 (a trial court decision) has been overruled. In overruling the trial court, the New York Appellate Division held that the medical society there involved was not so clothed with a public interest or State action as to permit the Applicant to compel judicial admission. (*Kurk v. Medical Society of Queens, Inc.*, 264 N.Y.S. 2d 859, November, 1965.)

Petitioner is not, as claimed, prevented from practicing his profession, nor even his chosen specialty within that profession. (Section 18.) Respondents have no control over the practice of dentistry nor the practice of orthodontics (except for the high ethical standards that it maintains for its own members).

In this case none of the factors visiting "State action" on other organizations in cases cited by Petitioner are present here. Whether or not a particular activity constitutes State action " * * * can be determined only in the framework of the peculiar facts or circumstances present * * *". (*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, 6 L. Ed. 2d 45, 52; *Evans v. Newton*, ... U.S. ....., 15 L. Ed. 2d 373 at 377.)

While arguing a negative is difficult, we submit that the record here clearly shows that Respondents are in no way clothed with State action. It does not

in any way control or even advise in selection of members of the State Board of Dental Examiners, or any other Commissions or Councils. It does not furnish a list of nominees to any governmental agencies for such selections. It receives no state or federal funds. While it has rules and regulations and principles of ethics applicable to its own members, it has no control over non-members. It has no powers, either directly or indirectly, over the granting or revoking of licenses to practice dentistry.

Orthodontics is practiced in the office and not in hospitals. Patients are derived in part from other dentists and in good part from other patients and their families. Respondents can not in any way control Petitioner's right to continue the practice of orthodontics. His continued practice thereof and announcement of limitation of practice were never limited or interfered with by Respondents, and are now clearly ethical under Section 18 of the Principles of Ethics of the American Dental Association, an organization over which Respondents have no control. The record clearly discloses that he has received and continues to receive patients from other dentists in his locality, and has received cases from other orthodontists in the area. The record further discloses that he is a prominent member of the International Association of Orthodontists.

The above, we submit, clearly demonstrates that these Respondents are not engaged in State action, monopoly, nor is membership therein an economic necessity. The above also demonstrates that the "frame-

work" of the peculiar facts or circumstances present takes this case out of those relied on by Petitioner and others of a similar nature.

The following cases on the facts alone are clearly distinguishable from the instant case: (1) *Hawkins v. North Carolina Dental Society,* 34 U.S. Law Week 2428 (1966) (Society indirectly appointed members to State Boards, Commissions and the like. Held, state action, and racial discrimination improper); (2) *Bell v. Georgia Dental Assn.,* 231 F. Supp. 299 (Governor's statutory authority to appoint Board members only from a list of nominees submitted by the association); (3) *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (Federal Hospital construction funds given to state and in turn passed on to the hospital); (4) *Terry v. Adams,* 345 U.S. 461, 97 L. Ed. 1152 (Delegation by state to private groups of certain aspect of state elective process); (5) *James v. Marinship Corporation,* 25 Cal. 2d 721, 155 P. 2d 329 (Discrimination in membership of labor union having monopoly over supply of labor); (6) *Falcone v. Middlesex County Medical Society,* 34 N.J. 582, 170 Atl. 2d 791 (Surgeons membership in Medical Society controlling admission to staff membership in hospitals); (7) *Marsh v. Alabama,* 326 U.S. 501, 9 L. Ed. 265 (Suppression of free speech in a company owned town of over 1500).

The case most clearly in point here is that of *Salter v. New York State Psychological Association,* 140 N.Y. 2d 100, 198 N.E. 2d 250. In that case it was held that the New York State Psychological Associa-

tion was not in fact the State, and its activities in denying membership to plaintiff did not involve State action. The plaintiff was a psychologist of some repute and was certified as such under New York law. The Association was the most important association of psychologists in the state and acted as spokesman for the profession. Eight members of the Association's Board of Directors were members of the State's Advisory Council and aided in formulating State policies. The Association worked closely with the Advisory Council, made recommendations to the council on matters of ethics, revision of State law and the like. The contention that the Association was, in effect, the State and, therefore, its refusal to admit plaintiff to membership was a violation of the Fourteenth Amendment, was rejected. The court passed squarely on the question of whether the Association was so nearly "an arm of the State itself that equal protection and due process constitutional requirements make it unlawful for it to reject qualified and certified applicants." In holding that the Association was not, "in fact, the State" the court stated that such claim was "far fetched". Even though there was close cooperation between the Association and the State's own Advisory Council, the Court noted that "cooperation and leadership, advice and reliance on advice —these are shown, but not shown is delegation by or agency of the State".

We submit that the *Salter* case makes a much stronger showing of potential State action than this case. Even so, that claim was there rejected. Here,

there is no showing (and not even a claim) that these Respondents, or any of their officers (as officers of Respondents), are officially or unofficially connected with any State agency, work closely with any State agency or make any recommendations to State agencies concerning State law or otherwise. There is, we submit, a complete failure of Petitioner's claim of State action.

(B) EVEN THOUGH NOT REQUIRED, PETITIONER'S CONSTITUTIONAL RIGHTS WERE MORE THAN ADEQUATELY PROTECTED BY RESPONDENTS.

Assuming, without conceding, that the due process and equal protection provisions of the Fourteenth Amendment extended to the activities of Respondents in excluding Petitioner from membership, we submit that their mandate has been complied with. Petitioner was not, as claimed, excluded because of the so-called adverse comments or hearsay complaints. On the contrary, his exclusion was based solely on lack of professional competence, his refusal to accept advice concerning improvements, his refusal to permit observation of his work and his failure to follow reasonable requirements concerning his second application.

After receipt of the first application, and after receiving the adverse comments (more than ever before with any other applicant), the Committee decided to "take a closer look at" Petitioner in order to assure itself that he did have the necessary and adequate mechanical and biological knowledge. The decision was made to give him an examination, to which he

agreed, by the entire Membership Committee of the P.C.S.O. This examination he failed in two out of three parts. He was tried (if that term may be loosely applied) on his professional competence exhibited by him at the examination—not on what others said about him. His first application was withdrawn to obviate publicity and embarrassment.

Following Petitioner's failure of this examination, refresher courses were suggested but not taken. Offers of help from Committee members were rejected but with one exception (the lone visit to Dr. Hahn's office). On the second application he refused to allow the Drs. Ballard and Cox to come to his office to see his practice, a customary procedure on all applicants.

Instead, Petitioner secured endorsers from other communities, knowing that this was in violation of the policies and practices of Respondents. (He was told this by Dr. Hahn, had on two previous applications secured local endorsers, and the requirement clearly appears on the application form supplied by Respondents A.A.O. in accordance with the by-laws.) In securing these endorsers, Petitioner failed to advise them that Orthodontists in his community had refused to sign, that he had refused these local orthodontists permission to come to his office and observe his practice, that he failed to take the refresher courses previously suggested, and had failed to accept other offers of help. These sponsors later, realizing that they should not have signed since they were not from Petitioner's community and had not observed his practice and procedures, voluntarily withdrew their

sponsorship upon learning of these additional facts withheld by Petitioner.

Based on these indisputable facts, it clearly appears that Respondents gave Petitioner every opportunity to become professionally qualified, and that these opportunities were rejected. The Fourteenth Amendment requires no more than fair and equal opportunity and consideration. This and more was done in Petitioner's case. His failure to obtain admission rests squarely on his own failures, and not on any unfair or unreasonable actions of Respondents.

III

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE ACTION OF THE CALIFORNIA COURTS AND PETITIONER'S CONSTITUTIONAL RIGHTS WERE PROTECTED BY THEM.

Unless the decision of the District Court of Appeal amounts to a mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights this Court cannot interfere. (*American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 71 L. Ed. 639.)

It is a well settled principle of California law that the Appellate Court, when reviewing the findings of a trial court, begins with a presumption that they are supported by the evidence, and it is incumbent upon the appellant to demonstrate that there is no substantial evidence to support the challenged findings. (*Tangora v. Matanky,* 231 C.A. 2d 468, 471, 42 Cal.

Rptr. 348.) It was within this rule that the District Court of Appeal reviewed and sustained the findings of the trial court. The substantial evidence to support these findings has been shown by Respondents in II (B) supra. Petitioner was given a fair examination which he failed; failed to secure the proper endorsers; refused to take refresher courses and other offers of help; and would not allow anyone to come to his office and review his work.

Where the facts found by the trial court are adopted by the highest state court and, as shown supra II(B), are supported by substantial evidence, this Court will not ordinarily reexamine them. (*Portland R. L. & P. Co. v. Railroad Commission,* 229 U.S. 397, 57 L. Ed. 1248.)

In *Frey Roofing Co. v. Wood,* 344 U.S. 157, 97 L. Ed. 168, Petitioner contended that the findings of the state court were without evidential support. This Court accepted the findings as they were not without factual foundation, and there were no exceptional circumstances to justify their rejection.

Furthermore, where the trial judge bases the findings upon conflicts and interpretations of the testimony, and reasonable inferences to be drawn therefrom, this Court, in exercising judicial review, will not ordinarily make an independent evaluation of that testimony and substitute its judgment. (*Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 85 L. Ed. 836.)

Petitioner's cause was heard by the trial court sitting without a jury. The judge had the opportunity

to hear and weigh the testimony offered by both sides, and to draw his inferences therefrom to support his findings. His findings, as stated in the opinion of the District Court of Appeal were amply supported by the evidence. (Appendix B, p. 25.)

Petitioner's further contention that the action of Respondents was sustained by the District Court of Appeal opinion "on the sole ground that the Petitioner did not have the necessary recommendations . . . ." is equally without merit. On the issue of whether or not the findings and judgment of the trial court was supported by the evidence the District Court stated:

> "The evidence summarized by us in considerable detail above, together with the reasonable inferences deducible therefrom, amply supports the above findings and at the same time justifies the judgment." (Appendix B, p. 25.)

Petitioner also argues that the endorser requirement is in no way related to his professional qualifications. The District Court of Appeal rejected this point by stating:

> "The various qualifying requirements which have impeded plaintiff's admission to membership in defendant organizations are directed only to his professional qualifications." (Appendix B, p. 28.)

The endorser requirement enables those in the area or community in which an applicant intends to practice to visit his office and see his work in an effort to determine whether or not they can properly endorse

him pursuant to the by-laws of the Respondent societies. It is most reasonable and fair.

CONCLUSION

Respondents respectfully submit that this Court is without jurisdiction to review the judgment of the District Court of Appeal and that the activities of Respondents do not constitute state action.

On the other hand if this Court finds in favor of Petitioner on these two issues, we submit that the action of Respondents and the District Court of Appeal was not unreasonable or arbitrary and therefore did not deny Petitioner due process and equal protection of the law.

Respondents respectfully request that this Court deny the Writ of Certiorari.

Dated, April 1, 1966.

THOMAS L. CROFT,
PEART, BARATY & HASSARD,
ALAN L. BONNINGTON,
Attorneys for Respondents.

(Appendix A Follows)

AMERICAN DENTAL ASSOCIATION

211 East Chicago Avenue • Chicago, Illinois 60611 • Area Code 312, WHitehall 4-6730

PRINCIPLES OF ETHICS OF THE AMERICAN DENTAL ASSOCIATION SECTION 18

Section 18. Announcement of Limitation of Practice. -- Only a dentist who limits his practice exclusively to one of the special areas approved by the American Dental Association for limited practice may include a statement of his limitation in announcements, cards, letterheads and directory listings (consistent with the customs of dentists of the community), provided at the time of the announcement, he has met the existing educational requirements and standards" set by the American Dental Association for members wishing to announce limitation of practice or posesses a state license permitting announcement in an area approved by the American Dental Association.

In accord with established ethical ruling that dentists should not claim or imply superiority, use of the phrases "Specialist in....." or "Specialist on...." in announcements, cards, letterheads or directory listings should be discouraged. The use of the phrase "Practice limited to....." is preferable.

*The following are included within the standards of the American Dental Association for determining the educational experience and other appropriate requirements for announcing a limited practice:

1. The indicated area of dentistry must be one for which there is a certifying board approved by the American Dental Association.
2. The dentist's practice must be limited exclusively to the indicated area of dentistry.
3. The dentist must have completed two or more academic years of advanced education as specified by the certifying boards, essentially all of which must be in or directly related to the selected area, or possess a state license permitting announcement in an area approved by the American Dental Association.

CERTIFICATION

I, the undersigned, Harvey Sarner, do hereby certify that I am the duly appointed secretary of the Judicial Council of the American Dental Association, which Judicial Council enforces the Principles of Ethics of the American Dental Association. I further certify that the above is a true copy of section 18 of the Principles

Principles of Ethics of the American Dental Association Section 18

Certification (continued)

of Ethics which section was adopted by the House of Delegates of the American Dental Association in November, 1961 and which became effective January 1, 1965, and I do further certify that section 18 as it appears above is now in full force and effect.

IN WITNESS HEREOF, I hereunto set my hand this fourth day of March, 1966.

Harvey Sarner

Harvey Sarner
Secretary, Judicial Council
American Dental Association